

NOV 23 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1403

NELSON BUNKER HUNT, W. HERBERT HUNT
and LAMAR HUNT,v. *Petitioners,*MOBIL OIL CORPORATION, TEXACO INC., STANDARD OIL
COMPANY OF CALIFORNIA, THE BRITISH PETROLEUM
COMPANY, LTD., SHELL PETROLEUM COMPANY, LTD.,
EXXON CORPORATION, and GULF OIL CORPORATION,*Respondents.*On Petition for Writ of Certiorari to the United States
Court of Appeals for the Second CircuitBRIEF FOR RESPONDENTS IN RESPONSE TO
BRIEF FOR THE UNITED STATES AS AMICUS CURIAE*Of Counsel:*MARK D. WEGENER
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006EDWARD F. HOWREY
A. DUNCAN WHITAKER
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
202/783-0800RICHARD H. ZAHM
JULIET SHEPARD
Mobil Oil Corporation
150 East 42nd Street
New York, New York 10017
212/883-8315Attorneys for Respondent
MOBIL OIL CORPORATION

[List of Attorneys continued on inside cover]

G. KENNETH HANDLEY
LAWRENCE R. JERZ
Texaco Inc.
2000 Westchester Avenue
White Plains, New York 10650
914/253-4000

KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022

JOHN W. CASTLES, 3D
HARRY G. SKLARSKY
DAVID H. MARKS
CAROLYN T. ELLIS
LORD, DAY & LORD
25 Broadway
New York, New York 10004

WALLACE J. KAACPKE
RICHARD J. MACLAURY
PILLSBURY, MADISON & SUTRO
225 Bush Street
San Francisco, Calif. 94104

JOSEPH FERRARO
SHEA, GOULD, CLIMENKO
& CASEY
330 Madison Avenue
New York, New York 10017

ROBERT M. OSGOOD
LAKE WISE
SULLIVAN & CROMWELL
48 Wall Street
New York, New York 10005

FRANK W. MORGAN
Gulf Oil Corporation
P. O. Box 1166
Pittsburgh, Pa. 15230
412/391-2400

CHARLES O. MURRAY, III
Gulf Oil Co.—U.S.
P. O. Box 2100
Houston, Texas 77001

CHARLES F. KAZLAUSKAS
2000 Westchester Avenue
White Plains, New York 10650
914/253-4000

MILTON J. SCHUBIN
425 Park Avenue
New York, New York 10022

Attorneys for Respondent
TEXACO INC.

GORDON B. SPIVACK
25 Broadway
New York, New York 10004
212/344-8480

Attorneys for Respondent
STANDARD OIL COMPANY
OF CALIFORNIA

BRUCE A. HECKER
330 Madison Avenue
New York, New York 10017
212/661-3200

Attorneys for Respondent
THE BRITISH PETROLEUM
COMPANY

ROBERT MACCRATE
48 Wall Street
New York, New York 10005
212/952-8100

Attorneys for Respondent
EXXON CORPORATION

JOHN E. BAILEY
P. O. Box 2100
Houston, Texas 77001
713/226-2142

Attorneys for Respondent
GULF OIL CORPORATION

TABLE OF CONTENTS

	Page
I. The Government's Brief Confirms the Petition's Critical Failings	1
II. The Justice Department's Proposed Distinction Between Motivation and Validity is Neither Viable Nor Valid	3
Conclusion	7

TABLE OF AUTHORITIES

Cases:	Page
<i>Banco Nacional de Cuba v. Sabbatino</i> , 376 U.S. 398 (1964)	6
<i>Hunt v. Mobil Oil Corp.</i> , 550 F.2d 68 (2d Cir. 1977)	5, 6
<i>New York Times Co. v. City of New York Commission On Human Rights</i> , 41 N.Y.2d 345 (1977)	4
<i>Underhill v. Hernandez</i> , 168 U.S. 250 (1897)	4
<i>Zschernig v. Miller</i> , 389 U.S. 429 (1968)	4
 Other Materials:	
Rule 23(4) of the Rules of the Supreme Court of the United States	2

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1403

NELSON BUNKER HUNT, W. HERBERT HUNT
and LAMAR HUNT,*Petitioners,*

v.

MOBIL OIL CORPORATION, TEXACO INC., STANDARD OIL COMPANY OF CALIFORNIA, THE BRITISH PETROLEUM COMPANY, LTD., SHELL PETROLEUM COMPANY, LTD., EXXON CORPORATION, and GULF OIL CORPORATION,
*Respondents.*On Petition for Writ of Certiorari to the United States
Court of Appeals for the Second CircuitBRIEF FOR RESPONDENTS IN RESPONSE TO
BRIEF FOR THE UNITED STATES AS AMICUS CURIAEI. The Government's Brief Confirms the Petition's
Critical Failings

Although desiring the application of the act of state doctrine altered, the Solicitor General is constrained to acknowledge the petition's fundamental defects which,

under Rule 23(4) of this Court's Rules,¹ alone warrant the denial of certiorari.

Thus, after explaining that a

"determination of the bearing of the act of state doctrine on this case *requires* at the outset an analysis of the theory of the third claim of the complaint," (Br. p. 5; emphasis added),²

the Solicitor General advises that "petitioners' own explanation of the theory of their third claim does not appear entirely consistent." (Br. pp. 5-6). Indeed, the Government's brief finds that "petitioners appear to be inaccurate," (Br. p. 6 n.4), that "petitioners seem to place different and somewhat inconsistent constructions on the complaint" and that their description of the legal issues "in particular seems to be a contradiction in terms." (Br. p. 6 n.3).

It is respectfully submitted that certiorari would be patently inappropriate under these circumstances,³ however much the Government may desire an advisory opinion covering very different situations.⁴

¹ Rule 23(4) provides:

"The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

² The Brief for the United States is referred to as "Br." The Petition and Appendices attached thereto, are referred to as "Pet." and "Pet. App." respectively.

³ Petitioners are not *pro se* complainants for whom one may wish to indulge in some measure of surmise, but are among the world's richest individuals and have been represented by experienced and competent counsel, throughout.

⁴ The present case does not involve commercial (as opposed to governmental) activities by a foreign government nor bribery or any other inducement of, or collaboration with, governmental action by defendants (Pet. App. A, p. 23a; Pet. p. 33). Yet, the Government's brief makes clear that it is such situations which prompt its

II. The Justice Department's Proposed Distinction Between Motivation and Validity is Neither Viable Nor Valid

The Solicitor General finds no error in the lower courts' reading of the Third Claim or in their analysis that (a) a causal connection between the alleged violation and the alleged injury is essential in a private action under the antitrust laws, (b) the injury to petitioners resulted from the knowing and intentional governmental acts of Libya (cutting back Hunts' production, shutting off their oil and nationalizing their properties) and therefore (c) adjudication of the claim would require inquiry and judgment respecting the motivation behind those sovereign actions. Thus, the Solicitor General's brief admits that, no matter how petitioners have attempted to twist the opinions of both of the lower courts, the "court of appeals and the district court appear correct in their observation that proof on the third claim necessarily would require judicial examination into the motives of the Libyan government in expropriating petitioners' property." (Br. p. 7). The Government's brief further recognizes that the act of state doctrine precludes such an examination into the validity of the Libyan government's actions. (Br. p. 7-8).

What the Government's brief seeks is that a distinction be drawn between the validity of a sovereign act and its underlying motivation. Such a distinction, it is respectfully submitted, is not valid or viable in the context of the act of state doctrine.

recommendation that the petition be granted to change the act of state doctrine, rather than any concern with the unique, far-fetched claim in this case involving a purported wrongdoing that consists of allegedly misleading a sophisticated businessman, with the aid of the Justice and State Departments, into resisting a foreign government's takeover demands somewhat more strenuously than he might otherwise have resisted them. (Br. p. 5, 12-15).

First, although "validity" or "legality" are frequently used as shorthand terms, it is the very act of adjudication or the "sitting in judgment" which is at the heart of the act of state doctrine. The classic statement of the doctrine is set forth in *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) as follows:

"Every sovereign State is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." (Emphasis supplied)

Second, motivation and validity are inextricably intertwined in this context, with motivation frequently controlling whether a sovereign act is legal or illegal. For example, a government's expropriation of an alien's property in retaliation for the conduct of the alien's government is illegal under international law. The propriety or validity of a governmental act will depend upon whether it was arbitrarily or capriciously undertaken, was otherwise the product of improper motives or, on the other hand, was motivated by valid and proper factors. A conclusion that a government's motivation was one or the other is tantamount, as a practical matter, to labeling the resulting action valid or invalid.

Third, assuming arguendo that motivation and validity may be separated, the reasons for the act of state doctrine are no less applicable to motivation than to validity.⁵ Thus, even the Solicitor General admits that

⁵ Indeed, a finding that an act of state was arbitrary and capricious seems more potentially embarrassing than a statement that, because compensation was not adequate, a nationalization decree was invalid as a matter of international law. In *Zschernig v. Miller*, 389 U.S. 429, 434 (1968), this Court forbade inquiries into "whether the representation of consuls, ambassadors, and other representatives of foreign nations is credible or made in good faith." See also *New York Times Co. v. City of New York*

"an inquiry into the motives of the Libyan government's act of expropriation would have the potential of embarrassing that government and of affecting our government's conduct of foreign relations. Petitioners' [sic] may offer proof amplifying, or even possibly contradicting official governmental explanations." (Br. p. 9).

The Court of Appeals had observed:

"Any possible doubt about this issue is in any event removed since upon the seizure of Hunt's property on June 11, 1973 President al-Qadhafi announced '[W]e proclaim loudly that this United States needs to be given a big hard blow in the Arab area on its cold, insolent face. . . . The time has come for the Arab peoples to confront the United States, the time has come for the U.S. interests to be threatened earnestly and seriously in the Arab area, regardless of the cost.' The note of the United States to the Libyan government on July 8, 1973 in response both to the seizure and the public statements of Libya concerning it, characterized the expropriation as 'political reprisal against the United States Government and coercion against the economic interests of certain other U.S. nationals in Libya.'" *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 73 (2d Cir. 1977), (Pet. App. A, p. 10a, footnotes omitted).

To prevail, petitioners would have to establish that both the Libyan government *and* the United States government were not being truthful when they attributed the nationalization of petitioners' property to ". . . an act of political reprisal against the interest of the United States and its citizens." (Br. p. 9 n.7). Needless to say, the avoidance of such potential conflict between judicial findings, State Department declarations and representations by the head of a foreign government, is one of the

Commission on Human Rights, 41 N.Y. 2d 345, 353 (1977). Whatever the nomenclature used, judicial abstention from inquiry into the motivation of a foreign government's official acts is mandated by foreign affairs and public policy consideration.

bases for the act of state doctrine. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432-433 (1964).

Finally, the Solicitor General in no way undermines the further and independently sufficient explanation offered by the Court of Appeals for judicial abstention in this case:

"Even if the Department of State had not spoken, the inquiry required by the third claim in this private litigation is hardly within the fact finding competency of the judicial branch. Appellants claim that but for the conspiracy pleaded, Hunt's business would have continued to thrive and its properties would have remained unscathed and intact. This necessarily would require a wholesale examination of Libyan policy—how did it treat other companies, what provoked its 'displeasure,' how far could concessions by Hunt appeals President al-Qadhafi. The action taken here is obviously only an isolated act in a continuing and broadened confrontation between the East and West in an oil crisis which has implications and complications far transcending those suggested by appellants. To dismiss this examination as an issue of fact and not of law and therefore beyond the ambit of the act of state doctrine is, in our view, neither conceptually nor pragmatically sound." *Hunt v. Mobil Oil Corp.*, *supra* at 78, (Pet. App. A, pp. 20a-21a; footnotes omitted).

CONCLUSION

For the foregoing reasons and those stated in our main brief, plaintiffs' petition for certiorari should be denied.

Respectfully submitted,

Of Counsel:

MARK D. WEGENER
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006

EDWARD F. HOWREY
A. DUNCAN WHITAKER
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
202/783-0800

RICHARD H. ZAHM
JULIET SHEPARD
Mobil Oil Corporation
150 East 42nd Street
New York, New York 10017
212/883-8315

Attorneys for Respondent
MOBIL OIL CORPORATION

G. KENNETH HANDLEY
LAWRENCE R. JERZ
Texaco Inc.
2000 Westchester Avenue
White Plains, New York 10650
914/253-4000

CHARLES F. KAZLAUSKAS
2000 Westchester Avenue
White Plains, New York 10650
914/253-4000

KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022

MILTON J. SCHUBIN
425 Park Avenue
New York, New York 10022

Attorneys for Respondent
TEXACO INC.

JOHN W. CASTLES, 3D
 HARRY G. SKLARSKY
 DAVID H. MARKS
 CAROLYN T. ELLIS
 LORD, DAY & LORD
 25 Broadway
 New York, New York 10004

WALLACE J. KAACPKE
 RICHARD J. MACLAURY
 PILLSBURY, MADISON & SUTRO
 225 Bush Street
 San Francisco, Calif. 94104

JOSEPH FERRARO
 SHEA, GOULD, CLIMENKO
 & CASEY
 330 Madison Avenue
 New York, New York 10017

ROBERT M. OSGOOD
 LAKE WISE
 SULLIVAN & CROMWELL
 48 Wall Street
 New York, New York 10005

FRANK W. MORGAN
 Gulf Oil Corporation
 P. O. Box 1166
 Pittsburgh, Pa. 15230
 412/391-2400

CHARLES O. MURRAY, III
 Gulf Oil Co.—U.S.
 P. O. Box 2100
 Houston, Texas 77001

GORDON B. SPIVACK
 25 Broadway
 New York, New York 10004
 212/344-8480

Attorneys for Respondent
 STANDARD OIL COMPANY
 OF CALIFORNIA

BRUCE A. HECKER
 330 Madison Avenue
 New York, New York 10017
 212/661-3200

Attorneys for Respondent
 THE BRITISH PETROLEUM
 COMPANY

ROBERT MACCRATE
 48 Wall Street
 New York, New York 10005
 212/952-8100

Attorneys for Respondent
 EXXON CORPORATION

JOHN E. BAILEY
 P. O. Box 2100
 Houston, Texas 77001
 713/226-2142

Attorneys for Respondent
 GULF OIL CORPORATION